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**Critiques of Human Rights**

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### Keywords

human rights, critique, realism, empirical legal studies, legitimacy, equality

### Abstract

Empirical critiques of human rights have reached a crescendo. Despite their centrality in late modernity, human rights face claims of irrelevance and predictions of demise. These social science–inflected assessments follow a familiar repertoire of critique. Concerns surrounding sociological legitimacy, material effectiveness, and distributive equality are foregrounded and undergirded by a growing body of empirical evidence, especially in sociology, political science, and anthropology but also in economics and social psychology. However, the critique has also catalyzed a counter-critique. A contending body of evidence accompanied by mid-level theorizing suggests that the turn to human rights has been more successful than imagined. This paper argues that it is difficult to reach any definitive conclusion given the role of normative biases in the research and a failure to agree on common benchmarks for evaluation. Nonetheless, with an emerging postliberal order, and a deepened concern over respect for human rights in both democracies and autocracies, critiques and counter-critiques deserve consideration in ensuring that the political project of human rights is both effective and equitable.

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## INTRODUCTION

“We are living through the endtimes of the civilizing mission” (Hopgood 2014, p. 1). So opens one of three recent empirically oriented, book-length, and full-throated polemics on the subject of human rights. In Hopgood’s (2014, p. 1) *The Endtimes of Human Rights*, the international regime and secular religion of human rights is crumbling on account of its “systematic ineffectiveness” and “lack of democratic accountability.” If anything, human rights does more harm than good, as it provides an “ideological alibi to a global system whose governance structures sustain persistent unfairness and blatant injustice” (p. 2). Hopgood’s proposed remedy is an unfastening of the human rights straightjacket and a return to bottom-up subaltern politics.

Some of the same warnings can be found four years earlier in Moyn’s (2010) *The Last Utopia*. After charting the spectacular international breakthrough of human rights in the 1970s, he depicts human rights as a victim of its own success. The neutrality of human rights that permitted this dramatic international turn to rights was unsustainable. As advocates moved beyond a narrow set of rights and issues within a specific context, they were “forced to confront the need for political agenda and programmatic vision” but lacked the political and bureaucratic tools for such purposes (Moyn 2010, p. 213). Moyn (2018) has returned to the stage with an even more sharpened critique. In *Not Enough: Human Rights in an Unequal World*, he argues that the “human rights have become prisoners of the contemporary age of inequality,” rising with but not challenging neoliberal globalization (p. 6).

The third author in this eschatological trilogy is Posner (2014) with *The Twilight of Human Rights Law*. His conclusion, simply put, is that “human rights law has failed to accomplish its objective” (p. 7). There is “little evidence that human rights treaties, on the whole, have improved the wellbeing of people, or even resulted in respect for the rights in those treaties.” Posner’s remedial medicine differs from Hopgood’s and Moyn’s. He stands in the realist rather than critical tradition. Thus, under certain circumstances, Posner advocates the use of coercion by Western states to ensure the implementation of human rights and the rigorous deployment of social science methods in policy making. Human rights advocates should learn from the revival of development cooperation with its targeted, experimental, and evidence-based approach (p. 143).

Social science–inflected critiques of human rights are hardly new.<sup>1</sup> A critical and empirical literature on human rights law, discourses, and movements was already present in the late 1990s (Baxi 1998, Hafner Burton & Ron 2007, Kennedy 2001, Rajagopal 2007). What is striking, though, is the volume of contemporary critique and the apocalyptic predictions. This juncture provides a timely justification for charting and reflecting on these criticisms—particularly those that emanate from critical theory and realism rather than liberalism and utilitarianism. After a brief overview of the rise of human rights (especially its legal dimension), the article focuses on three persistent empirically tinged critiques: the absence of sociological legitimacy, lack of effectiveness, and distributive inequality. Philosophical and legal critiques of human rights have their own histories and debates but are largely not considered.<sup>2</sup>

The discussion is moderated by a critical analysis of the critiques. The empirical literature is far from homogeneous. Conditioned and optimistic assessments also abound. Drawing on ideas in

<sup>1</sup>This is especially true in sociology, political science, economics, anthropology, and history.

<sup>2</sup>Philosophers continue to dispute the justification, scope, and content of human rights, although the rise of international human rights regimes has reinvigorated these debates and provided a departure point for renewed critique (see O’Neill 2005, Cranston 1983, and Griffin 2008 but also defenses from Nickel 2008, Beitz 2009, and Sen 2009). Familiar critiques by lawyers are also oriented to the new phenomenon, although they exhibit a strong bipolarity. Treaty interpretation is critiqued for being too expansive or conservative (e.g., Cali 2007, Tully 2005), the strengthening of judicial power is regarded as illegitimate or not far-reaching enough (Dennis & Stewart 2004, Kozma et al. 2010), and the elevation of human rights in international and domestic norm hierarchies is viewed as legally unfounded or long overdue (Dupuy et al. 2009).

critical modernity (Peet & Hartwick 2009),<sup>3</sup> reflexive legal sociology (McCann 2014, Scheingold 1974), and new legal realism (Nourse & Shaffer 2009), the article parses this alternative literature and interrogates under what conditions the critiques might hold. Such reflexivity is especially necessary in a postliberal age. The shadow of populism, illiberal democracy, and authoritarianism may be evidence of the failure of human rights, or it may very well confirm or remind us of its enduring importance, including for sustainable forms of social justice.

## THE RISE OF HUMAN RIGHTS

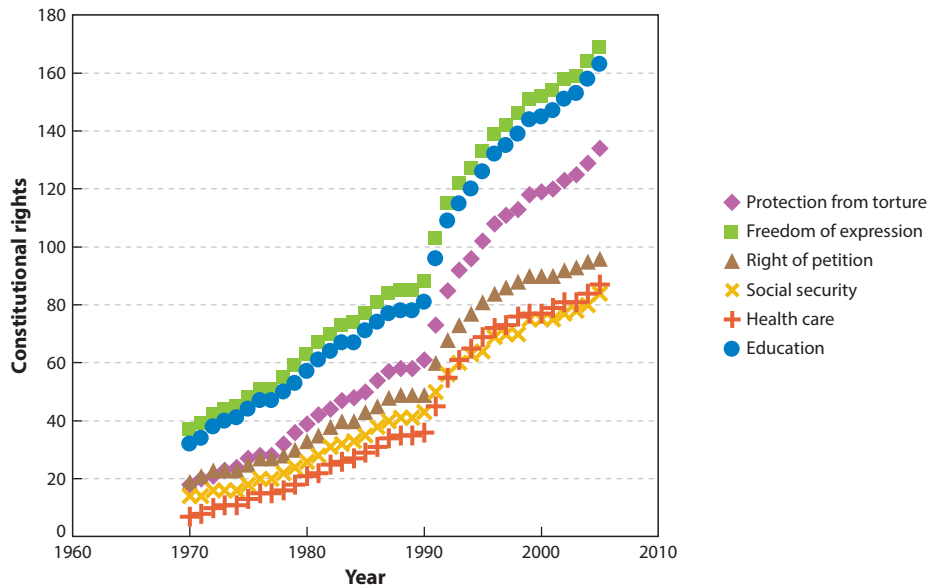
Scholars are sharply divided over when human rights emerged and who were the principal protagonists. The origins at a global level might be placed anywhere between the antislavery campaigns of the early 1800s and the collapse of socialist and postcolonial utopias in the late 1970s (Bass 2010, Jensen 2015, Moyn 2010). The possible central actors in this development are equally diffuse. European cosmopolitan elites, Christian democrats, the postcolonial South, muscular American humanists, Eastern European solidarity movements, Latin America lawyers, nongovernmental organizations, and even artists and novelists in the 1700s have all been named as pioneers (Hopgood 2014, Hunt 2007, Jensen 2015, Lorca 2015, Moyn 2015).

What most scholars do agree on is that by the 1990s, human rights had materialized as a dominant international discourse, a global lingua franca. With a dizzying array of international legal rules and institutions, the human rights project was set on remedying the past deeds of authoritarian governments, monitoring elections, advancing women's empowerment, tackling malnutrition and lack of health care, and, to a certain extent, even halting the march of privatization and corporatization (Chong 2010). A cascading set of international human rights conventions, declarations, and other standards provided a new vocabulary—with nine core multilateral treaties ranging from civil and political rights and economic, social, and cultural rights through to women's rights, children's rights, disability rights, and enforced disappearances—and became an important currency in framing moral and political claims.

This legal architecture was accompanied by a dense set of international institutions, with policy-making and monitoring bodies, prominent regional human rights courts, and roving UN special rapporteurs, all of which are targeted and promoted by a transnational network of civil society actors driving new standards, carrying out fact-finding missions, and mobilizing victims to use international mechanisms. Human rights also soon rippled out into other areas of international law and practice, most notably in the rise of international criminal courts and tribunals and their influence on international humanitarian law, Security Council resolutions (e.g., sexual violence, child soldiers), and international development cooperation. In 1997, then-UN Secretary-General Kofi Annan directed all UN agencies to mainstream human rights.

This tectonic shift was not confined to the international arena. Human rights have equally affected domestic politics. It is visible in the rash of widespread constitutional reform (in preambles, bills of rights, and incorporation of human rights treaties), foreign policy discourses and (partly) legislative framing, the creation of national human rights institutions, and the arrival and multiplication of human rights-based civil society organizations. **Figure 1** shows the remarkable acceleration in the constitutional recognition of a range of civil and social rights over the last four decades. Moreover, even where rights discourse and mobilization have been significantly suppressed (e.g., China), human rights has been a prominent language of struggle

<sup>3</sup>Methodologically, this means that one is suspicious of fixed theories, approaches, and conclusions, demanding a “relentless reviewing of processes and methods and continual reinvention of vocabulary” (Redhead 2005, p. 39).



**Figure 1**

Trends in constitutional rights, 1970–2005. Original data come from the Comparative Constitutions Project Data Set. The trend lines reflect whether for each year a constitution (dated by its most significant recent reform) included the particular right. Because the recognition of some rights may occur in earlier constitutional amendments, a margin of error is likely.

even if vernacularized (Levitt & Merry 2009). Indeed, in many countries, the terms citizens’ rights and human rights have become largely synonymous, representing a full circle from the French Revolution, when these concepts were kept clearly separate (see, e.g., Cepeda-Espinosa 2004).

## SOCIOLOGICAL LEGITIMACY

The global ambition of human rights discourse has been long disputed on the grounds of sociological illegitimacy. The regular but sweeping claim that human rights are universal and constant makes them vulnerable to empirical critique.<sup>4</sup> As Bartelson (2009, p. 2) succinctly put it, any “effort to impose a given set of values on the existing plurality of communities in the name of a common humanity is likely to be met with resistance on the grounds of its very own particularity.”

The most illustrative moment of such critique remains the protest by anthropologists during the drafting of the most quintessential human rights document, the Universal Declaration of Human Rights. The American Anthropological Association challenged the emerging declaration on both epistemological and representative grounds. If human beings do not “function outside the societies of which they form a part,” then it is highly likely that any “human right in one society may be regarded as antisocial by another people” (Exec. Board, Am. Anthropol. Assoc. 1947, pp. 539, 542). Human rights were an expression of value conflicts rather than consensus. Further, owing to the Western origins of human rights, such universalistic articulation of values was nonrepresentative (p. 539). In the distinct language of sociological legitimacy, the Association argued that the declaration:

<sup>4</sup>Human rights has been nicely described as “a search for moral standards of political organization and behavior that is independent of the contemporary society” (Heard 1997, p. 77).

It will not be convincing to the Indonesian, the African, the Indian, the Chinese, if it lies on the same plane as like documents of an earlier period. The rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single culture. (p. 543)

Ever since, this critique has waxed and waned in the practice of international relations. Notable instances were the high-profile Asian values debates of the 1990s (Engle 1999) and the African values debates of the 1960s and 1970s (Howard 1983), while the academic protest has been particularly trenchant among postcolonial and poststructural authors (Cobbah 1987, Pollis & Schwab 1979, Rahnema 1997).

This cultural critique has been sharpened by the claims of active Western imperialism. Hopgood (2014) traces the largely particularist origins of human rights to the development of a “secular religiosity” by Europeans humanitarians (based on Christian beliefs in a universal humanity). But he is especially critical of the appropriation of human rights in the 1970s by “American humanists,” as human rights became a vehicle for partisan US foreign policy and military intervention. Moreover, the third wave of democracy in the Global South and former Soviet bloc from the 1980s could be characterized as a “Janus faced transition” (Habib 2014, p. 137). These Southern states embraced political democratization but also the global dictates of economic liberalization. This liberalization was itself entrenched in international economic law—promotion of investor and free trade (Alston 2002, Langford 2011)—and promoted as human rights by some actors (Dupuy et al. 2009).

A leading critic, Makau Mutua (2008, p. 1029), brings these epistemological, representative and imperialist concerns nicely together when he writes

The human right corpus views the individual as the center of the moral universe, and therefore denigrates communities, collectives, and group rights . . . This is a particularly serious problem in areas of the world where group and community rights are deeply embedded both in the cultures of the peoples, and exacerbated by the multinational nature of the postcolonial state.

This critique of universalistic human rights has prompted three responses of a distinctly empirical nature. The first was apologetic. Whereas some claimed that the critics were simply engaged in “cultural absolutism” (Howard 1993), some theorists moderated theories of human rights in an attempt to dampen the ambitiousness of empirical claims. These scholars highlighted actually existing universals and the importance of identifying a common core of cultural practices (Walzer 1994), overlapping consensus and conditions for legitimating authority (Williams 2006), or progressive convergence of values over time (Taylor 1999). In the same vein, but with less deference, others have emphasized the multiple ways in which human rights law provides significant space for cultural and national variation. Open-textured provisions, polyvalent terminology, limitations, defenses, exceptions, subsidiarity doctrines (e.g., margin of appreciation), soft forms of review, and space for treaty reservations mean that human rights could not be reduced to a singular ideology or Western export. As Donnelly (2007, p. 303) argues,

the (relative) universality of internationally recognized human rights does not require, or even encourage, global homogenization or the sacrifice of (many) valued local practices. . . Quite the contrary, (relatively) universal human rights protect people from imposed conceptions of the good life, whether those visions are imposed by local or foreign actors.

Moreover, leading Western states have been largely unsuccessful in their attempts to exclude social and economic rights and various collective rights (such as rights to development and environment) from the international human rights agenda.

There is much to be said for these contingent constructions of human rights. However, these responses rarely fully resolve the matter. Each decade brings a new debate about the extent to which human rights provides space for particularity. Currently, claims to universality are riven by a largely religious–secular axis. This schism is nowhere more apparent than on sexual and reproductive rights. For example, in the West, more than 70% of people believe that society should accept homosexuality, but the figure drops under 10% in most African and Middle Eastern countries (Pew Res. Cent. 2013), a division reflected in state positions in the United Nations.<sup>5</sup>

The second response has been empirical. Defenders of human rights point out that cultural critics present a simplistic or incorrect view of the evolution of human rights. The South’s long-standing promotion of human rights is often neglected. Scholars have pointed to the precolonial Indian experiments with democracy and recognition of religious tolerance (Sen 2009), the heavy non-Western scholarly and state involvement in drafting the Universal Declaration on Human Rights (Glendon 2001),<sup>6</sup> and the leadership role of Southern states in promoting the first wave of human rights conventions (Jensen 2015). In contemporary times, organizations have conducted global surveys that underline broad public support for the idea and values of human rights (Amnesty Int. 2014, United Nations 2014). Moreover, sociolegal scholars have noted the deployment of human rights by diverse social movements and communities during the past few decades (de Sousa Santos & Rodríguez Garavito 2005, Merry 2006) and the dawn of a possible shift in the hegemony of nongovernment organizations from the North to the South (Rodríguez Garavito 2015). Even the right to property—that most quintessential of liberal rights—has been embraced by indigenous peoples in Latin America to defend and claim land rights (Pasqualacci 2013).<sup>7</sup> Thus, drawing on a framework such as critical modernity, one can herald the recognition of personal agency and autonomy in human rights but not necessarily subscribe to a singular Western expression of it, opening up for multiple modernities that may predate or diverge from Western modernity (Eisenstadt 2000) and that locate “people’s desire for development in individual subjectivities and local social and cultural configurations” (Raghuram 2009, p. 106).

However, a lively debate exists as to the extent of the contemporary Southern character of human rights. Scholars note the dominance of Southern elites rather than the subaltern in human rights movements and organizations (Chatterjee 2004) and that social movements often use human rights in a rather instrumentalist and tactical manner (Madlingozi 2014, Miller 2010). Where Southern perspectives and approaches do contribute to the human rights discourse, there is also a question of their penetration (Hopgood 2014). It is also possible to find ongoing reluctance from Northern states (and many lawyers) regarding demands from movements in the South, whether it is rights to food sovereignty (pushed by transnational peasant movements), water as a public good (championed by anti-privatization movements), or the right to the city (driven by urban social movements in Latin America and now Africa and Asia) (Bakker 2007, Bond 2010, Harvey 2003, Langford & Bhattarai 2011). All of these rights directly and deeply challenge market and

<sup>5</sup>For example, in a recent challenge to a UN General Assembly resolution concerning same-sex spousal entitlements for employees in the international organization, the Russian Federation mobilized 43 votes and 37 abstentions—leaving only 80 states supportive of the new rule. GA Fifth Committee, 69<sup>th</sup> Session, 33<sup>rd</sup> Meeting (AM), 24 March 2015, UN. Doc. GA/AB/4150. The UN directive is ST/SGB/2004/13/Rev.1.

<sup>6</sup>Even in 1945, inclusion of human rights in the UN Charter was strongly demanded by small states—from Brazil to Lebanon to Australia to the Philippines—which were wary of the enhanced powers influence of the five large powers under the UN Charter.

<sup>7</sup>In India, there is a lively debate as to whether constitutional amendments weakening the right to property were wise in the aftermath of the Supreme Court’s propriety judgments in the 1950s and 1960s. Although the right to property was invoked in that period to protect economic elites, contemporary deprivations of property rights now concern the poor, as the state has endorsed or driven large-scale displacement and eviction.

global elites as much as they build on and incorporate the existing human rights framework. In this respect, the international human rights framework has been more adept at incorporating transformational/radical demands based on identity (race, sex, age, and disability) than class.<sup>8</sup>

The third response has been political. Political scientists and lawyers tend to view the issue of legitimacy institutionally. Bull's [2002 (1977), p. 82] iconic *The Anarchical Society: A Study of Order in World Politics* foregrounds the importance of a legitimate political process:

There is, indeed, no lack of self-appointed spokesmen of the common good. . . . But the views of these private individuals, whatever merit they have, are not the outcome of any political process of the assertion of and reconciliation of interests.

One leading international human rights lawyer, Philip Alston (1984, p. 608), echoes this pragmatism, arguing that we should simply defer to the General Assembly on the question of what counts as human rights: "For the first time in history, at the international level, a final arbiter had emerged in an area where conflicting ideologies, cultures and interests had previously made the prospect of general agreement seem far beyond reach and even utopian."

Yet, despite the acceleration of new standards, such pragmatism is not always accepted, and Bull [2002 (1977), p. 82] himself acknowledges that states regularly distort the idea of a world common good. New institutionalist scholars point out the remarkable mimicry in the constitutionalization of human rights (Meyer et al. 1997), suggesting that states are not particularly engaged in any deliberative process over universals. The widespread ratification of human rights treaties may contain false positives, as states formally consent to deflect attention away from either dissensus or lack of concrete respect for human rights (Posner 2014). Human rights may be easily reduced to being a "façade investment" (Moene & Søreide 2015), whereby domestic political elites make reforms that simultaneously maximize international legitimacy and minimize the need to change corrupt and unjust domestic practices and structures. The variation in compliance among states with human rights law (Hillebrecht 2014, Langford et al. 2017) may also suggest an absence of consensus on key values.

Drawing the threads together, the legitimacy critique (plus the various counter-critiques) is a reminder that human rights are inherently a political construction for political purposes. Their legitimacy ultimately depends on their political resonance and functionality. In particular, if human rights provides a relevant framework and resource that constrains the discursive and material space for powerful actors, then it can serve (or has served) an important role in many parts of the world. The extent to which it is effective as such is a question to which we now turn.

## EFFECTIVENESS

The effectiveness critique finds a broader group of adherents in social science. It ranges from those on the left who emphasize the countervailing power of the market and state (Bond 2010, Hirschl 2004) to a more realist center-left and right that place greater trust in hard material forms of accountability, such as economic incentives, electoral contestation, or collective bargaining (Posner 2014). For both, the centrality of discourse and law in rights approaches combined with weak intermediaries, such as courts, professionals, and lower-order government departments and donor agencies, generates skepticism. McCann (2014, p. 256) sums up this paradox in his ruminations on the "unbearable lightness of rights":

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<sup>8</sup>Note, however, discussion in the section titled Effectiveness on the role of human rights in tackling economic inequality.



In short, if rights are so light and supple [in order to gain support], they must also mean very little and carry little weight as a challenge to the status quo; they are merely the superficial “um” and “ah” of social and political banter, mere talk rather than action with sufficient material consequence to compel respect.

Empirical evidence is often called upon to reveal the futility of human rights standards, advocacy, and policy. Early studies of the impact of international human rights treaties and constitutional rights revealed little evidence of progression on key civil, social, and political rights (Hafner Burton & Ron 2007, Mäkinen 2001). Likewise, research on the effects of rights-based approaches of civil society organizations shows mixed and largely localized impacts (Gready 2009). States have also resisted the decisions of international courts through delay, reinterpretation, and outright resistance—refusing calls by the International Criminal Court to deliver indicted war criminals, rejecting reforms demanded by the European Court of Human Rights (ECtHR), or dragging their feet in the recognition of indigenous land claims as required by the Inter-American Court of Human Rights.

Enthusiasm about early ground-breaking human rights decisions by national courts soon engendered criticism. In India, judgments against forced evictions of urban pavement dwellers [*Olga Tellis v. Bombay Municipal Corporation* (1985)] and rural farming and tribal communities [*Narmada Bachao Andolan v. Union of India* (2000)] provided little protection against mass displacement (Rajagopal 2007); in South Africa, slum-dwellers in Cape Town apparently remained consigned to their shacks after the celebrated *Grootboom* judgment (Pieterse 2007) [*Government of the Republic of South Africa and Others v. Grootboom and Others* (2000)]; and in Colombia, judgments on systemic prison reform were systematically ignored (Rodríguez Garavito & Rodríguez-Franco 2016). The weight of the critique seemed to confirm Hazard’s (1969, p. 712) conclusion and prediction that “the contribution of civil justice is diffuse, microcosmic, and dull.”

This effectiveness critique is represented, though, by a broad church of critics. Descriptions and explanations diverge considerably. On one hand, scholars that begin in critical theory or sociology tend to emphasize the minimalism of human rights. Its tepid impact is firstly a function of design. Human rights are often promoted by scholars as a morality of the depths rather than an aspiration of the heights (e.g., King 2012, Nickel 2007).<sup>9</sup> This self-restraint may help gain legitimacy, but it can quickly limit the more expansive dimensions of social, civil, and political rights. One result is that rights-based approaches may become the handmaiden for neoliberalism, mobilized to promote target-based notions of social rights rather than the development of universal coverage (Fischer 2013). A second form of minimalism concerns technique. Courts, bureaucrats, and professional-driven civil society organizations may apply human rights in a highly technical, legalistic, or deferential manner (Bond 2008, Brand 2009, Pieterse 2007). The combination of both features results in what we might call a double minimalism. As Roithmayer puts it, the “discourse of human rights pulls a sleight of hand” by offering “only very limited recognition of moral claims” and converting them into “bureaucratic, technical legal problems” (cited in Bond 2010, p. 15).

Whether this description of human rights as inherently formalistic and liberal is correct is open to question. The turn to human rights since the 1980s has partly been transformational in its objectives. Contemporary rights expressions are more expansive and diverse than their nineteenth-century forebears. Moreover, the progressive stream of human rights has viewed human rights as an analytic and institutional resource for articulating a wide range of justice and democratic concerns to challenge power relations and structural violence (Farmer 2003; Moser et al. 2001; Offenheiser & Holcombe 2003, p. 271; Yamin 1996). As Yamin (2008, p. 49) states,

<sup>9</sup>The term “morality of the depths” was first coined by Shue (1996, p. 18).

The rights-based emphasis on assigning responsibility is not an afterthought about how to garner sufficient political will to make “technical interventions” effective; such an approach instead focuses from the beginning on mapping the operations of power at work in responding to public health problems, as well as in shaping vulnerability [and] . . . does not “take resource constraints as natural givens but [treats] them as the result of past choices.”

Moreover, some international treaties are highly transformative in design and create significant compliance challenges for developed and developing countries alike—especially the conventions on children’s rights and disability rights (Blanding 2012, Sköld 2013). Others, like Campbell (1983), have gone further and sought to fuse socialist leftist thought with rights, strongly affirming traditional liberty rights but seeking a prioritizing of social and economic rights. Interestingly, Campbell is also open to positivizing rights in law (including in abstract constitutional forms) on the grounds that such rules can prefigure substantive forms of justice. However, even in (most) of these progressive versions of human rights there is a degree of political restraint—from a critical theory perspective. Rights function at most as a critical norm rather than a critical alternative.

Others, especially economists and public policy professionals, baulk at the maximalism of contemporary human rights. Social human rights and the positive dimensions of civil and political rights can imply significant fiscal costs (Nickel 2007). Moreover, all human rights may imply the imposition of opportunity costs on other actors or individuals (Kelley 1998, p. 12; Nozick 1974; Lamont & Favor 2013, section 6). The nonconsequentialism embedded in human rights may frustrate economic growth or social policy by imposing more regulations or participatory processes. Whether human rights are costly is debatable. One comprehensive survey of the evidence suggests that civil rights, democracy, and rule of law do not harm, and perhaps even promote, economic growth (McKay & Vizard 2005). And whereas Chauffour (2009) finds that this does not hold for social rights, Randolph & Guyer (2012, pp. 319–21) found that among 128 states, a small minority of states were able to achieve and maintain a virtuous cycle of high growth and high social rights realization,<sup>10</sup> while most achieved neither of these outcomes.

These minimalist and maximalist critiques partly emerge because human rights are deeply polyvalent. Their content, form, and institutionalization vary considerably. However, from the perspective of effectiveness, the two critiques can be mutually compatible. That is because a maximalist perception of costs represents a political obstacle for human rights practice that the minimally equipped human rights enterprise is ill equipped to change. In these circumstances, the two forms of critique work in the same direction. Put bluntly, if human rights are situated in a hostile political economy, loose coalitions of liberal and leftist groups and international organizations may struggle to mobilize social change through the repertoires of action offered by human rights.

Yet these effectiveness critiques require validation, and the evidence is complicated. This is partly due to methodological challenges. First, one needs to examine indirect and political effects and not simply material impact. As Scheingold (1974) argues, “It is necessary to examine both the symbolic and the coercive capabilities which attach to rights.” Second, there is no clear consensus in social sciences as to the baseline for measuring impact (Feeley 1992, Rosenberg 1991). It is common to measure effects before and after (often finding a glass half full), but some argue that they should be evaluated against their promise (the result usually being a glass half empty). Third, correlation does not equal causation, and research on both positive and negative impacts of human rights struggles with attribution (Sano 2015)—even if advances in regression analysis

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<sup>10</sup>The likely reason is the design of economic regulation and social policy rather than the overall size of the welfare state (Brady 2006, Cichon et al. 2004).

and processing tracing have partly alleviated this concern (Simmons 2009). Lastly, the choice of time period can heavily influence findings. Longer time periods can reveal diffuse effects but also confounding influences (Feeley 1992). For example, the realm of scholarship that critiqued the lack of impact of the above-mentioned South African flagship case, *Grootboom*, focused on the years immediately after the case, yet the key changes came 5–10 years later as direct policy and jurisprudential changes took effect (Langford 2014).

Some of the studies, such as Sikkink's (2017) recent book *Evidence for Hope*, track general improvements since the emergence of specific human rights movements in the 1940s. Sikkink (2017, p. 141) largely adopts Posner's (2014) congruence method, which seeks to draw together broad correlations, but finds the opposite result: "My survey of the current data suggests that overall there is *less* violence and *fewer* human rights violations in the world than there were in the past." Moreover, she highlights how availability heuristics (our focus on dramatic events) and negativity bias (we pay more attention to negative information) shapes how we interpret the impact of human rights (pp. 159–62). According to Sikkink, such biases foster pervasive cynicism despite the broader trends.

However, the challenge with congruence studies is that they can be easily criticized for paying insufficient attention to causation. A significant literature on the effects of human rights treaties and specific rights has tried to control for different causal mechanisms. For example, Simmons's (2009) quantitative analysis suggests that ratification of treaties can have moderate impact, especially in transitional middle-income states. Likewise, ratification of an individual complaint protocol tracks improvements in human rights after adjustment with different controls (Simmons 2009). The effects of specific international human rights institutions vary considerably. The Universal Periodic Review has had concrete impact in specific countries on diverse issues (White 2018), whereas the periodic reviews of UN human rights treaty bodies are highly variable in their impact on states (even developed states) (Krommendijk 2014). Quantitative evaluations of the latter suggest that democracies, and especially new democracies, are likely to be "more transparent about shortcomings, more thorough in proposing measures to address deficiencies and more responsive to committee concerns" (Creamer & Simmons 2015, p. 607). Variance can also be found with international courts. Some have been credited with generating significant legal and social change (e.g., the ECtHR), whereas others have mixed records, such as the Inter-American Court of Human Rights and the International Criminal Court (Bailliet 2017, Gravel et al. 2001, Grewal & Voeten 2012, Helfer & Voeten 2014, Hillebrecht 2014, Jo & Simmons 2014, Keller & Sweet 2008, Stiansen 2018). Indeed, several reviewers have noted Hopgood's selective treatment in critiquing the impact of the International Criminal Court but ignoring completely the ECtHR.

Impact can also be examined by studying the effects of advancing new rights that may be politically unpopular or challenging to implement, such as LGBT (lesbian, gay, bisexual, and transgender) rights and socioeconomic rights. In most but not all Western countries, advances in LGBT rights have first and foremost been a product of domestic struggles and changes in public opinion. However, the international human rights system and discourse have been a pioneering force in influencing developments in select Western and Latin American countries (e.g., Austria, Australia, the United Kingdom, and Chile), propelling significant legislative and policy change in almost all Eastern European countries, and opening space for political and judicial developments in Africa and Asia (e.g., Kenya, India, Nepal, and Taiwan). For example, Helfer & Voeten (2014) estimate that six ECtHR judgments on LGBT rights increased the probability of policy change by about fourteen percentage points in any given year. One key causal mechanism identified was legitimation: The judgments enabled sympathetic liberal/left-leaning governments to justify policy reform in the face of strong public opposition. Likewise, the first UN decision on same-sex relations (*Toonen v Australia*, Human Rights Committee, Commun. No. 488/1992) in 1994

not only helped transform Australian law and politics on this issue but anchored these rights within the UN system and judicial reasoning throughout the world (Langford & Creamer 2018). Domestic judgments on LGBT rights have been particularly transformative in shifting public policy and opinion, for example, in South Africa, Costa Rica, the United States, and Nepal (Keck 2009, Marcus & Budlender 2008, Wilson 2009). However, the international human rights regime and national courts have perhaps struggled most in seeking to overcome racial discrimination, as evidenced by the very high rates of noncompliance with decisions and resolutions on these rights (Dobrushin & Alexandridis 2017). Likewise, high-profile decisions concerning the rights of prisoners or terrorism suspects have been resisted by states owing to their political unpopularity (Voeten 2013).

Likewise, socioeconomic rights have been viewed as a hard case for international human rights on the grounds of their (qualified) resource demands and seemingly political nature. However, a range of studies suggest that the impacts of socioeconomic rights strategies may not be so different from those based on civil and political rights (Çali & Koch 2017, Hellum & Aasen 2015). Put simply, effectiveness varies from place to place and time to time. In an in-depth empirical and quantitative study of five developing countries, Gauri & Brinks (2008) found that socioeconomic rights litigation might have averted thousands of deaths and affected the lives of millions. Rodríguez Garavito & Rodríguez-Franco (2016) find that a constitutional court-led process shifted both allocation of resources and public discourse concerning the internally displaced in Colombia (until the Syria crisis, the largest number of internally displaced in the world at more than 6 million).

However, these studies rarely find that legalized human rights alone are decisive in engendering social change. It is the mobilization and invocation of human rights in politics that is essential (Simmons 2009). Social movements, professional alliances, reflexive courts, and strategic bureaucrats and politicians are often essential in championing rights and challenging deep-rooted structures of exclusion, discrimination, and power asymmetry (Langford et al. 2014). Qualitative and quantitative evidence shows that entitlement-based laws backed by courts can be particularly effective (Heymann et al. 2012, Huchzermeyer 2003), whereas Banik (2010) argues that human rights approaches to development are less effective in rural Africa because literacy is lower and the state is less present. Compliance can also be significantly slower when reforms require either a multiplicity of actors or institutional reform (Huneus 2011, Wilson & Rodríguez 2017). Ultimately, the research on legal approaches shows that deeper change is dependent on whether human rights are framed in a transformative manner, provide a space for transformative action, or are accompanied by a transformative vision or mobilization (see, e.g., Jones 2018, p. 107; Moyn 2018, p. 217).

Human rights have also been deployed by social movements and not only professional non-governmental organizations. Rarely do local uses of rights mirror constitutional or international standards, but neither do they wholly reflect local custom. According to Robins (2008, pp. 11–13), individuals use the levers and discourse of rights as “citizens” (we could also add “humans”) when it suits them, but they are just as likely to turn to other tactics in their capacity as “subjects,” for example, through the forms of accountability embedded in customary and patronage-based relationships. Likewise, although social movements generally prefer highly noninstitutional and disruptive action repertoires (Tarrow 2005), if they lose their newsworthy or mobilizing novelty or are subject to state control (Taylor & Van Dyke 2004), more institutionalized tactics may be one option within a constrained political opportunity structure (Madlingozi 2014, Scheingold 1974).

## **DISTRIBUTIVE EQUALITY**

Any reading of contemporary human rights standards and discourse cannot fail to notice the emphasis on equality. In perusing international treaties, Buchanan (2010) points out that

egalitarianism is the constant feature. Human rights are ascribed to “all persons,” demand “robust equality before the law,” “encompass social and economic rights that can reduce material inequalities and indirectly constrain political inequalities,” guarantee the right of citizens “to participate in their own government,” and “contain rights against all forms of discrimination” (pp. 683–84). He even notes that the word adequate (which frames many social rights) opens up for a social comparative understanding of distribution of material resources rather than a mere minimum. This emphasis on equality seeped into the open-textured post-2015 development agenda. Not only did civil society movements and groups around the world make human rights the benchmark for the Sustainable Development Goals, but more demanding and egalitarian demands were articulated in human rights language (Langford 2016). Moyn (2018) has also shown how social rights in the 1940s were understood in an egalitarian manner.

However, a common critique of human rights is that they are far from equipped, theoretically and practically, to address equality, particularly its structural and cognitive dimensions (Nickel 2007). At most, human rights help shine a spotlight on formal discrimination and help individuals gain a threshold level of access. However, human rights approaches do not leverage a fairer distribution of both political and material resources and opportunities and may even widen such inequalities.

Two forms of inequality are examined here: democratic and material. The democratic critique focuses on the manner in which human rights approaches fail to address power relations or effective political agency. The seeming preference for state-centric, duty-oriented, and legalized or ahistoricized conceptions of justice appears to clash sharply with more open-ended collective or experimental notions of participation. For Neocosmos (2009, p. 276), “citizenship, from an emancipatory perspective, is not about subjects bearing rights conferred by the state, as in human rights discourse” but rather about people who become “agents through engagement as militants/activists and not politicians.” Moreover, human rights may not only disempower the subaltern but also overpower experts. Elites, professionals, and lawyers have been quick to master the new language of human rights and its opportunities and often stand accused of undermining its emancipatory potential. In analyzing transitional justice in fragile postconflict settings (largely grounded in civil and political rights), Madlingozi (2010, p. 225) paints this picture:

A well-traveled international cadre of actors—what I have called transitional justice entrepreneurs—  
theorize the field; set the agenda; legitimize what constitute appropriate transitional justice norms  
and mechanisms; influence the flow of financial resources; assist governments in transition; invite,  
collaborate with and capacitate “relevant” local NGOs and “grassroots organizations”; and ultimately  
not only represent and speak for victims but “produce” the victim.

Although human rights approaches are littered with a “participatory” discourse (UN-OHCHR 2008), their ability to shift power relations is regularly questioned. Human rights do include macrolevel participation rights (free elections, speech, unionization, and association) and recognition of rights to sectoral-level participation in a host of social, environmental, and civil rights. But achieving genuine participation is another matter: It often entails a loss of power for some actors. Indeed, the problem is not reserved to human rights. Citizenship conceptions of rights, such as Marshall’s (1964), are rooted within the idea of the modern welfare state (Crowley 1998), which can be understood and practiced in forms that exclude particular groups (e.g., migrants) or alternative visions of development and welfare (e.g., indigenous peoples).

Nonetheless, the literature is studded with case studies of the progressive uses and appropriations of human rights that permit social movement organization and democratic experimentalism in diverse countries across the developing world (Andreassen & Crawford 2013, Gaventa 2006, Madlingozi 2010). Many of these instances involve professionals and institutional actors in

various roles but preserve space for the genuine autonomous people's movements (Madlingozi 2014), thus remaining consistent with a critical modernity that "favours alliances that draw together the powers of the oppressed majority to counter what is otherwise the overwhelming power of the exploiting minority" (Peet & Hartwick 1999, p. 198).

Even more prominent, though, is the critique that human rights offers few resources in the struggle against material inequality. Moyn's (2018) latest book is brutal in this respect, claiming that human rights emergence in the age of inequality makes it at best irrelevant or at worst complicit, but nonetheless calls for the human rights movement to reembrace the egalitarian project.

In various fields of human rights law, distributive consequences have been closely examined. One such area is the effect of courts on socioeconomic rights—ironically, it is the branch of human rights most attuned to material differences but therefore provides an interesting test case for illustration. For example, differences in distributional outcomes after seminal litigation on financing for the constitutional right to education in all 50 US states are not particularly encouraging. Initial studies in the 1970s and 1980s pointed to few, very modest changes. In a longitudinal perspective, it is possible to observe a slight narrowing of inequalities, with litigation reducing the Gini gap by approximately 16%, while the bulk of the financing gains have accrued to low-income districts, with median-income districts partly benefiting (Berry 2007). Yet whether this is positive enough depends on one's baseline.

Inequality in court judgments on social rights has also been salient in debates on health rights litigation in Latin America. The concern is that a system of adjudication-based individual entitlements will favor, in a Galanterian sense, privileged applicants (Galanter 1974). In Brazil, for example, the judiciary has been generally cool toward collective action claims but more responsive to direct individual entitlement claims. As Hoffmann & Bentes (2008, p. 141) note,

Whereas in individual (access to medicine and treatment) actions the mere showing of prima facie evidence of medical need is usually accepted as sufficient for a claim to stand, courts are very reticent to appear to directly influence executive policy administration by conceding *erga omnes* claims.

The consequence, according to Ferraz (2011) and others, is that the primary beneficiaries of this Brazilian "rights revolution" are the middle class. He shows that the claims are highly concentrated in the wealthier states and municipalities, and within these localities there is a "very low prevalence of claims originating in the poorest districts" (p. 99). He concludes,

Rather than enhancing the provision of health benefits that are badly needed by the most disadvantaged—such as basic sanitation, reasonable access to primary health care, and vaccination programs—this model [of health rights litigation] diverts essential resources of the health budget to the funding of mostly high cost drugs claimed by individuals who are already privileged in terms of health conditions and services. (Ferraz 2011, p. 100)

Similar empirical arguments have been mounted in the cases of Colombia and Costa Rica (on Costa Rica, see Norheim & Gloppen 2011). As to the former, critics point to the middle-class capture of the *tutela* system. The fusion of the minimum core doctrine and the right to an immediate constitutional remedy (*tutela* action) favored the most disadvantaged in the 1990s, but during the economic crisis in the 2000s, the middle class were able to push the courts to consider their concerns (Rueda 2010).

However, this picture of distributive bias is disputed and requires nuancing. First, Brinks & Gauri (2014, p. 383) come to different quantitative findings on the Brazilian medicine litigation. In their sample, they include indirect beneficiaries, given "that the states stop opposing judicial

claims for that medication and begin supplying it routinely.” Drawing on 7,000 cases, they find that the pattern of distribution meets one measure of distributive equality:

Not only is the income distribution among indirect beneficiaries close to the income distribution in the population, but it is also reasonably close to the income distribution of SUS users—36% compared to 43%. This is not, of course, propoor, according to our definition—indeed, it is slightly regressive, though close to neutral, even when compared to the public health system, which is itself not terribly propoor by this measure. (p. 21)

In the case of Colombia, Rodríguez-Garavito (2014) points out that *tutelas* have been used as frequently to ensure compliance with existing noncontributory publicly managed health plans as for those on the contributory privately managed health plans. Moreover, a significant share of litigation has concerned gray zones, where medicines and other accessories necessary for a funded treatment are not included. This is not to dispute the distributive bias in some of the Colombian cases, particularly the ordering of some expensive medicines with limited utility (Norheim & Gloppen 2011). However, any distributive bias is restricted to a particular set of cases.

Second, the critical focus is only on the 2000s. In the 1990s, litigation in these states was largely pro-poor or universalist. Individual applicants were able to secure a range of basic social rights, and courts in all three countries forced the state to take the HIV/AIDS crisis seriously, benefitting groups across the socioeconomic spectrum. Any assessment of the Latin American experience needs to take this changing scenario into account. Moreover, the Colombian Constitutional Court has attempted to rein in this problem, for example, by tightening evidentiary requirements in 1997 and issuing structural judgments requiring the state to rationalize health policy and procedures in 2008. The second intervention has only been partly implemented, suggesting that its interventions may have been too mild or that the lower courts are unmanageable (Young & Lemaitre 2013). A similar readjustment by the Constitutional Court has also had mixed results (Loaiza et al. 2018).

Third, a focus on right-to-health cases occludes numerous decisions on other social rights in many countries that have been made for disadvantaged individuals (Wilson & Dugard 2014). In right-to-education litigation in Brazil, Brinks & Gauri (2014, p. 384) find that “at least 78% of beneficiaries of education litigation come from the lower two income quintiles, so that the underprivileged are overrepresented in Brazil’s Education-Regulation litigation by about 4 to 1.” Moreover, Brazilian courts have sometimes been quite proactive in protecting the rights of slum dwellers.<sup>11</sup> This is not to suggest that all other judgments in these countries are progressive in terms of equality. For instance, there are many propoor judgments in Colombia, but there are also collective cases directed toward the social rights of the middle class and other privileged groups. For instance, in three seminal cases in 1999, the Colombian Constitutional Court struck down a market-based formula for determining interest rates for social housing schemes.<sup>12</sup> While prohibitive interest rates threatened more than a quarter of the 800,000 individuals or families with excessive levels of debt, Yepes (2006) queries the distributive implications of the cases given the cost of the new financing system.

## CONCLUSION: HUMAN RIGHTS IN A POSTLIBERAL AGE

The slow march of rights should be met with a critical reflex. An extensive body of literature warns of optimistic prognoses or enthusiastic declarations of universal consensus and rights revolutions.

<sup>11</sup> See, e.g., the *Maceio Municipality* case, Dist. Court Child. Adolesc. Proc. No. 4.830/07, Sept. 10, 2007 (Brazil) and discussion in De Schutter (2010) and Burity et al. (2011).

<sup>12</sup> Corte Constitucional (C.C.), 1999, UPAC I, Decision C-383 (Colomb.); C.C., 1999, UPAC II, Decision C-700 (Colomb.); C.C., 1999, UPAC III, Decision C-747 (Colomb.) (see discussion in Cepeda-Espinosa 2004, p. 644).

However, any critique requires empirical sensitivity and theoretical reflexivity, allowing for a dynamic, constructive, and grounded understanding. Indeed, rights perhaps function well as a tool for constant and empirical critique with a search for contextual solutions, rather than the basis for overarching political and policy programs. Thus, one version of rights might fit seamlessly with Cox's (1981, p. 130) notion of the proper role of critical theory in social science, in its call for a "feasible transformation of the existing world."

Critics of human rights also need to face the question of alternatives. The rise of both left-wing and right-wing populism with strains of authoritarianism raises real questions as to the role and value of critique. From Poland to the United States, the Philippines to South Africa, human rights are the object of direct challenge and not simply benign neglect. The human rights project might be a partial cause of these developments—if it did encourage neglect of social equality and inclusion. But is a full-throttled critique of human rights productive in these circumstances, and can transformation occur without it? The recent experience of Venezuela is perhaps salutary as to the dangers of not incorporating civil and political rights in social transformations. A decade ago, Peet & Hartwick's (2009, p. 290) partial critique of human rights and call for radical democracy or democratic socialism led them to praise contemporary Venezuela as "a living tradition of critical thought." It looks less salient in hindsight, as they slid over the long-standing authoritarian strains of the Chavezian revolution and some questionable priorities in social policy.

Critique should be reflexive and struggle with contradictions.<sup>13</sup> At its core, it could reflect the Gramscian elements of critical modernity (Morera 2000, pp. 27–45): a committed empiricism and a foregrounding of counter-hegemonic subaltern movements, alliances, and communities and resistance to easy critique such as "resort to laws is an admission of social dysfunctionality" (Peet & Hartwick 2009, p. 289). A turn to law may represent a failure in collective participation yet remain necessary in concrete counter-hegemonic struggles (Madlingozi 2014), a phenomenon that de Sousa Santos & Rodríguez Garavito (2005) label "subaltern cosmopolitan legality."

However, a human rights project is not a sufficient condition for social transformation. A return is arguably needed to normative citizenship approaches that seek to establish participation as a set of grounded political rights with a deep respect for individual and popular agency (Hickey & Mohan 2005); equalization of distributional differences and universalist policies within nation-states (Fischer 2013, Marshall 1964)—even equity at the global level (Caney 2001); and embedment of accountability in institutional, economic, and social relations (Marshall 1964).

## DISCLOSURE STATEMENT

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<sup>13</sup>A pertinent example is Fraser's (2000) attempt to balance the recognition and resource dimensions of justice.



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#### TABLE OF CONTENTS FOR VOLUME 1:

##### THE DISCIPLINE

- *Reflections on Disciplines and Fields, Problems, Policies, and Life*, James F. Short
- *Replication in Criminology and the Social Sciences*, William Alex Pridemore, Matthew C. Makel, Jonathan A. Plucker

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- *The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration*, Katherine Beckett

##### THE PRISON

- *Inmate Society in the Era of Mass Incarceration*, Derek A. Kreager, Candace Kruttschnitt
- *Restricting the Use of Solitary Confinement*, Craig Haney

##### DEVELOPMENTAL AND LIFE-COURSE CRIMINOLOGY

- *Desistance from Offending in the Twenty-First Century*, Bianca E. Bersani, Elaine Eggleston Doherty
- *On the Measurement and Identification of Turning Points in Criminology*, Holly Nguyen, Thomas A. Loughran

##### ECONOMICS OF CRIME

- *Gun Markets*, Philip J. Cook
- *Offender Decision-Making in Criminology: Contributions from Behavioral Economics*, Greg Pogarsky, Sean Patrick Roche, Justin T. Pickett

##### POLICE AND COURTS

- *Policing in the Era of Big Data*, Greg Ridgeway
- *Reducing Fatal Police Shootings as System Crashes: Research, Theory, and Practice*, Lawrence W. Sherman
- *The Problems With Prosecutors*, David Alan Sklansky
- *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards, Alexes Harris
- *Forensic DNA Typing*, Erin Murphy

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# Contents

Eyewitness Science and the Legal System <i>Elizabeth F. Loftus</i> .....	1
Campaign Finance Disclosure <i>Abby K. Wood</i> .....	11
Conditions of Confinement in American Prisons and Jails <i>Christopher Wildeman, Maria D. Fitzpatrick, and Alyssa W. Goldman</i> .....	29
Correctional Autonomy and Authority in the Rise of Mass Incarceration <i>Keramet Reiter and Kelsie Chesnut</i> .....	49
Critiques of Human Rights <i>Malcolm Langford</i> .....	69
From Nudge to Culture and Back Again: Coalface Governance in the Regulated Organization <i>Ruthanne Huising and Susan S. Silbey</i> .....	91
Law and the Dead Body: Is a Corpse a Person or a Thing? <i>Ellen Stroud</i> .....	115
Law's Underdog: A Call for More-than-Human Legalities <i>Irus Braverman</i> .....	127
Norms, Normativity, and the Legitimacy of Justice Institutions: International Perspectives <i>Jonathan Jackson</i> .....	145
Rule-of-Law Ethnography <i>Nick Cheesman</i> .....	167
Environmental Security and the Anthropocene: Law, Criminology, and International Relations <i>Cameron Holley, Clifford Shearing, Cameron Harrington, Amanda Kennedy, and Tariro Mutongwizo</i> .....	185
Styles of Argumentation in Judicial Opinions (Legitimizing Judicial Decisions) <i>Nicholas Scurich</i> .....	205



The Use of Amicus Briefs <i>Paul M. Collins, Jr.</i> .....	219
The Contemporary American Jury <i>Shari Seidman Diamond and Mary R. Rose</i> .....	239
Social Media, the Internet, and Trial by Jury <i>Thaddeus Hoffmeister and Ann Charles Watts</i> .....	259
The Lessons and Limitations of Experiments in Democratic Deliberation <i>John Gastil</i> .....	271
The Criminal Law and Law Enforcement Implications of Big Data <i>Sarah Brayne</i> .....	293
The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy <i>Sandeep Vabeesan and Frank Pasquale</i> .....	309
The Rise of International Regime Complexity <i>Karen J. Alter and Kal Raustiala</i> .....	329
The Sharing Economy <i>Bronwen Morgan</i> .....	351
The Social Psychology of Property: Looking Beyond Market Exchange <i>Janice Nadler</i> .....	367
The Use of Case Studies in Law and Social Science Research <i>Lisa L. Miller</i> .....	381
Transitional Justice and Economic Policy <i>René Urueña and María Angélica Prada-Uribe</i> .....	397
Violent Video Games, Sexist Video Games, and the Law: Why Can't We Find Effects? <i>Christopher J. Ferguson</i> .....	411

## Indexes

Cumulative Index of Contributing Authors, Volumes 1–14 .....	427
Cumulative Index of Article Titles, Volumes 1–14 .....	431

## Errata

An online log of corrections to *Annual Review of Law and Social Science* articles may be found at <http://www.annualreviews.org/errata/lawsocsci>